SUPREME COURT, U.S.
Office - Supreme Court, U.S.
FILED
MAR 13 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 833 90

COLUMBIA BROADCASTING SYSTEM, INC., THE AMERICAN TOBACCO COMPANY, and JACK BENNY,

Petitioners,

vs.

LOEW'S, INC. and PATRICK HAMILTON,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

PAGE

Opinions below 1

Jurisdiction 1

Question presented 2

Statutes involved 2

Statement 3

Reasons for granting the writ 7

I.

This is a case of first impression 7

II.

The decision of the court below is clearly wrong 10

A. The test for infringement adopted below will stifle parody and burlesque 10

B. The doctrine of "fair use" should be applicable to parody and burlesque 13

C. Under the principles of "fair use," the burlesque "Autolight" does not infringe respondents' copyrights 17

III.

The question presented is of far-reaching importance 19

Conclusion 21

Appendix:

Synopsis of "Gaslight" ..... App. p. 1

Synopsis of "Autolight" ..... App. p. 7

TABLE OF AUTHORITIES CITED.

CASES	PAGE
American Institute of Architects v. Fenichel, 41 F. Supp. 146	14
Bloom & Hamlin v. Nixon, 125 Fed. 977	14
Bobbs-Merrill Co. v. Straus, 210 U. S. 339	13
Broadway Music Corp. v. F-R Pub. Corp., 31 F. Supp. 817	14, 18
Burstyn, Joseph, v. Wilson, 343 U. S. 495	20
Chamberlin v. Uris Sales Corp., 150 F. 2d 512	13
Columbia Pictures Corp. v. National Broadcasting Company, Civ. No. 16876-C	12, 19
Farmer v. Elstner, 33 Fed. 494	14
Fleisher Studios, Inc. v. Ralph A Freundlich, Inc., 73 F. 2d 276, cert. den. 294 U. S. 717	11
Folsom v. Marsh, 9 Fed. Cas. 342, No. 4901	14
Fox Film Corp. v. Doyal, 286 U. S. 123	13
G. Ricordi & Co. v. Mason, 201 Fed. 182	14, 17
Hannegan v. Esquire, 327 U. S. 146	20
Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302	11
Hill v. Whalen & Martell, Inc., 220 Fed. 359	14, 18
Karll v. Curtis Pub. Co., 39 F. Supp. 836	14, 18
Kustoff v. Chaplin, 120 F. 2d 551	11
Martinetti v. Maguire, 16 Fed. Cas. 920	13
Mathews Conveyor Co. v. Palmer-Bee Co., 135 F. 2d 73	14
Mazer v. Stein, 347 U. S. 201	11, 13
Paramount Pictures Corp. v. National Broadcasting Co., Inc., No. 172-57-WM	19
Shapiro, Bernstein & Co. v. P. F. Collier & Co., 26 U. S. P. Q. 40	14
Simms v. Stanton, 75 Fed. 6	14, 18
Universal Pictures Co. v. Harold Lloyd Corp., 162 F. 2d 354	11

PAGE

Warren v. White & Wyckoff Mfg. Co., 39 F. 2d 922.....11, 18
Wheaton v. Peters, 8 Pet. 591.....13
White-Smith Music Pub. Co. v. Apollo Co., 209 U. S. 1.....11, 13
Winters v. New York, 333 U. S. 507.....20

STATUTES

Copyright Act (61 Stat. 652).....2
United States Code, Title 17, Sec. 1.....2
United States Code, Title 28, Sec. 1254(1).....1
United States Constitution, Art. I, Sec. 8.....2, 13

TEXTBOOKS

Baddeley, Burlesque Tradition in the English Theatre (1952) ... 9
Ball, The Law of Copyright and Literary Property (1944), Sec. 137 16
33 Canadian Bar Review (1955), pp. 1130, 1154, Yankwich, Parody and Burlesque in the Law of Copyright.....7, 17
45 Columbia Law Review, pp. 503, 511, Chafee, Reflections on the Law of Copyright..... 15
56 Columbia Law Review (1956); p. 585, Parody and Copyright Infringement, Note..... 7
56 Columbia Law Review, pp. 585, 602-603, Note.....13
13 Corpus Juris, pp. 1113, 1118.....16
DeWolf, Outline of Copyright Law, pp. 97, 142.....16
Falk, American Literature in Parody (1955), p. 13..... 9
Kitchin, Survey of Burlesque and Parody in English (Oliver & Boyd Ed., 1931), p. ix..... 9
Lindey, Plagiarism and Originality (1952), p. 43.....16
31 New York University Law Review (1956), p. 606, Comment 7
Nicoll, The History of Early Nineteenth Century Drama (1930) 9
Nicoll, The History of Late Nineteenth Century Drama (1946) 9

PAGE

31 Notre Dame Law (1955), p. 46, Burlesque of Literary Property as Infringement of Copyright, Note 7

28 Rocky Mountain Law Review (1955), p. 134, Comment 7

Shepperson, The Novel in Motley; A History of the Burlesque Novel in English 9, 14

Shorter Oxford English Dictionary 8

10 Southwest Law Journal (1956), p. 68, Comment 7

Spring, Risks and Rights (1952), pp. 177, 183, 186 16

The Living Lincoln, p. 86 (Angle & Miers Ed., 1953) 8

Weil, Copyright Law (1917), p. 432 16

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Petitioners,

vs.

LOEW'S, INC. and PATRICK HAMILTON,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners Columbia Broadcasting System, Inc., The American Tobacco Company, and Jack Benny pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on December 26, 1956.

Opinions Below.

The opinion of the District Court [R. 223-274] is reported at 131 F. Supp. 165. The opinion of the Court of Appeals [R. 277-285] is reported at 239 F. 2d 532.

Jurisdiction.

The judgment of the Court of Appeals [R. 286] was entered on December 26, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented.

Did the court below err in holding that the doctrine of "fair use" is inapplicable to parody and burlesque, and that accordingly the author of a parody or burlesque of a copyrighted work is limited to only such insubstantial use of that work as is permitted the ordinary literary appropriator?

Statutes Involved.

The Constitution of the United States provides in pertinent part as follows:

"Article I, Sec. 8:

"The Congress shall have power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The Copyright Act, 61 Stat. 652, 17 U. S. C. Sec. 1, provides in pertinent part as follows:

"§1. Exclusive rights as to copyrighted works.

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

"(a) To print, reprint, publish, copy and vend the copyrighted work;

"(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete,

execute, and finish it if it be a model or design for a work of art;

* * * * * * * *

"(d) To perform or represent the copyrighted work publicly if it be a drama, or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;"

Statement.

This action was instituted by respondents to restrain petitioners from performing a parody or burlesque of respondents' copyrighted motion picture "Gaslight." The facts are not in dispute and were, in the main, stipulated [R. 47-75].

Prior to December 5, 1938, respondent Patrick Hamilton, a British author, wrote an original play titled "Gas Light" which subsequently was published, performed, and protected by copyright both in England and the United States [R. 49-52]. Respondent Loew's acquired exclusive motion picture rights to the play on October 7, 1942, for $150,000 [R. 52-53] and thereafter produced an original motion picture photoplay of the drama in which Charles Boyer, Ingrid Bergman and Joseph Cotten had starring roles [R. 53]. The motion picture photoplay entitled "Gaslight" was published with appropriate copyright

notice on May 5, 1944, and thereafter it was released for national and international distribution [R. 53-54]. The motion picture was withdrawn from domestic release in November, 1946, but its international distribution still continues [R. 56]. Up to August 31, 1952, the total production and distribution cost was $2,458,275.18, its total domestic and foreign revenues were $4,857,059.92, and nearly 52 million people had seen the picture [R. 55].

Since 1932, it has been the custom of the Jack Benny radio or television program to present short burlesques or parodies which poke fun at specific motion pictures and which are written especially for the program [R. 57]. In January, 1952, Barbara Stanwyck and Benny were featured on the Jack Benny program in a live television parody or burlesque poking fun at the motion picture "Gaslight" [R. 64]. The program was sponsored by petitioner The American Tobacco Company and was telecast over the Columbia Broadcasting System network [R. 64]. A television kinescope recording was made of the program and it was subsequently broadcast over stations affiliated with CBS [R. 64]. Thereafter Loew's notified CBS that it had exclusive rights to the production of "Gaslight," but CBS replied that the broadcast was a parody or burlesque which did not infringe the Loew's copyright [R. 65-67].

About May 28, 1953, CBS commenced the preparation of a filmed television playlet entitled "Autolight" which burlesqued "Gaslight" and which had been written especially for the Jack Benny program [R. 67]. It was

the intention of CBS to broadcast the parody or burlesque, which again starred Benny and Barbara Stanwyck, as a part of the filmed Jack Benny television program during the fall of 1953 [R. 67]. On June 9, 1953, Loew's notified respondents that it considered the making of "Autolight" to be an infringement of their copyright to "Gaslight," and on June 10, Loew's filed this action [R. 68]. The District Court entered a temporary restraining order against the production or performance of the parody or burlesque [R. 68]. The order was subsequently modified to permit the filming and printing of the proposed television performance but the film was impounded pending trial of the action [R. 25-27, 68].

Both the District Court and the Court of Appeals viewed the motion picture "Gaslight" and the television parody "Autolight" [R. 283]. Since it is believed that this Court will not wish to view the films in acting on this petition for certiorari, a synopsis of the motion picture and of the parody are set forth as Appendix A. Arrangements will be made to permit the Court to view the films if certiorari is granted or if the Court wishes to do so in acting upon the petition.

On May 6, 1955, District Judge Carter rendered an opinion in favor of respondents herein [R. 223-274]. The court held that "parodized or burlesque taking is to be treated no differently from any other appropriation; that, as in all other cases of alleged taking, the issue becomes first one of fact, i.e., what was taken and how substantial was the taking; and if it was determined that there was

a substantial taking, infringement exists" [R. 252]. On this question of fact, the court concluded that "there has been access, a substantial taking and therefore infringement" [R. 232]. The doctrine of fair use, the court indicated, does not justify any substantial use of a copyrighted work in the creation of a parody or burlesque [R. 252]. On May 20, 1955, the court entered findings of fact, conclusions of law and judgment which enjoined the performance of the filmed television program and ordered the prints thereof to be delivered up for destruction [R. 76-91].

The Court of Appeals affirmed on December 26, 1956 [R. 286]. The Court of Appeals adopted the holding of the District Court that a "parodized or burlesque taking is to be treated no differently from any other appropriation" and "if it is determined that there was a substantial taking, then infringement exists" [R. 285]. The Court of Appeals announced flatly that a burlesque presentation is "no defense to an action for infringement of copyright" and that "up to the time of the present controversy, no federal court, in any adjudication, has supposed that there was a doctrine of fair use" applicable to burlesque or parody [R. 284-285].

Reasons for Granting the Writ.

I.

This Is a Case of First Impression.

Although the literary art of parody and burlesque is as old as literature itself, the case presents squarely for the first time in the United States or England a legal question which underpins the entire art: Should an author in creating a parody or burlesque of a copyrighted work be limited to making only such insubstantial use of that work as is permitted to an ordinary appropriator, or do the nature and importance of this unique art form rather require that the recognized doctrine of fair use* be applicable to the author's use of the copyrighted work. The District Court recognized that "The case presents novel questions in the law of literary property and is a case of first impression. It presents a major issue . . ." [R. 223].**

Parody and burlesque constitute a wide genre of literary or dramatic composition lying within the realm of comedy in which an author seizes upon some well known "original" and, through distortion, inversion, exaggeration and all

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*The doctrine of "fair use," which is discussed at pp. 13-17, *infra*, permits a substantial use of copyrighted material for purposes which promote the progress of science and the useful arts.

**The novelty and significance of the issue have already provoked extensive comment in legal periodicals. Yankwich, Parody and Burlesque in the Law of Copyright, 33 Canadian Bar Rev. 1130 (1955); Note, Parody and Copyright Infringement, 56 Col. L. Rev. 585 (1956); Note, Burlesque of Literary Property as Infringement of Copyright, 31 Notre Dame Law. 46 (1955); Comment, 31 N. Y. U. L. Rev. 606 (1956); Comment, 28 Rocky Mt. L. Rev. 134 (1955); Comment, 10 S. W. L. J. 68 (1956).

the comic arts, tranforms the seriousness of the original into laughter.* By definition, there must be an "original" to burlesque or parody and it must be known to the audience of the parodist or burlesquer.** Moreover, because the author produces his comic effect by mental contrast, he must use enough of the original, which almost inevitably is serious or at least takes itself seriously, to remind the audience of its mood and content. A parody or burlesque is not simply a humorous work;

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*The Shorter Oxford English Dictionary defines "burlesque" as "That species of composition which excites laughter by caricature of serious works, or by ludicrous treatment of their subjects; a literary or dramatic work of this kind", and "parody" as "A composition in which the characteristic turns of thought and phrase of an author are mimicked and made to appear ridiculous, especially by applying them to ludicrously inappropriate subjects." Although technical distinctions can be made between burlesque, parody, travesty, and satire, the scholars themselves have not settled upon a definition of the terms and the question presented here does not require that a differentiation be made.

**This is not a requirement imposed by some abstruse scholar. About a year after Poe's "The Raven" was first published, a country lawyer in Springfield, Illinois, received a parody of that poem from a friend. He replied in part:

"April 18, 1846

"Friend Johnston:

"Your letter, written some six weeks ago, was received in due course, and also the paper with the parody. It is true, as suggested it might be, that I have never seen Poe's 'Raven,' and I very well know that a parody is almost entirely dependent for its interest upon the reader's acquaintanee with the original. . . .

"Yours truly,
A. Lincoln"

The Living Lincoln 80 (Angle & Miers ed. 1955).

it is inevitably a critique of the original and its nature as criticism is widely acknowledged.*

From the time of the Greeks, the greatest works of art and literature have been regularly burlesqued or parodied.** Homer's Iliad provoked the Battle of the Frogs and Mice (the Batrachomyomachia). The first English novel, Samuel Richardson's "Pamela: Or Virtue Rewarded" (1740), brought forth in 1741 the hilarious but penetrating "An Apology for the Life of Mrs. Shamela Andrews" by Henry Fielding. As the improvement in printing led to startling increases in the number of books published in the 19th Century, literary burlesques and parodies kept pace.*** Moreover, in nineteenth-century England nearly every important play was soon burlesqued.****

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*Dr. Frank C. Baxter of the English Department of the University of Southern California so testified at the trial [R. 144]. Kitchin's Survey of Burlesque and Parody in English (Oliver & Boyd ed. 1931), declares (p. ix) that burlesque is "a long-established mode of criticism, which is often far more incisive, and certainly more economical than the heavy review to which the public has been accustomed since the days of Dryden." Professor Falk in "American Literature in Parody," (1955), p. 13, states that "Parody is both a form of literary humor and a branch of criticism."

**There is an engaging summary of the history and tradition of parody and burlesque by Dr. Frank C. Baxter at R. 147-152; see also Kitchin, Survey of Burlesque and Parody in English (Oliver and Boyd ed. 1931); Shepperson, The Novel in Motley; A History of the Burlesque Novel in English (1936); Baddeley, Burlesque Tradition in the English Theatre (1952).

***Shepperson lists more than 100 burlesques of novels which appeared between 1830 and 1900. Shepperson, The Novel in Motley; A History of the Burlesque Novel in English (1936), Appendix.

****See Allardyce Nicoll, The History of Early Nineteenth Century Drama (1930); Allardyce Nicoll, The History of Late Nineteenth Century Drama (1946).

The 19th Century was also a high point of parody and burlesque in the United States. Bret Harte, Mark Twain, Phoebe Cary and a host of others lampooned the best of American fiction and poetry. Almost every serious play on Broadway was contemporaneously burlesqued by Weber and Fields in their Broadway Music Hall. In the 20th Century, Robert Benchley, S. J. Perelman, Corey Ford, Ogden Nash, E. B. White, Wolcott Gibbs and James Thurber have led a distinguished field of American humorists specializing in this genre. Yet despite the well established tradition of parody and burlesque, the vital issue involved here has never before been squarely presented for reported court decision in the United States or England.

II.

The Decision of the Court Below Is Clearly Wrong.

A. The Test for Infringement Adopted Below Will Stifle Parody and Burlesque.

The opinions of both courts below build on the same foundation for their conclusion that respondents can prevent petitioners from performing their parody or burlesque of the motion picture "Gaslight." Both courts hold that a parody or burlesque is to be treated no differently from an ordinary appropriation of copyrighted material and accordingly that infringement exists if there is a "substantial taking." Mechanically applying that test without any recognition of the special nature of parody and burlesque, the courts below conclude that the parody or burlesque of "Gaslight" must be enjoined because it uses more than an insubstantial amount of the copyrighted material. Under this ruling the doctrine of "fair use" is held to be inapplicable to parody and burlesque.

The ordinary plagiarism rule which the courts below would apply to parody and burlesque is highly restrictive. Copying is the basis of infringement under this rule, and, in the classic definition, "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1, 17; see *Mazer v. Stein*, 347 U. S. 201, 218. The test regularly applied by courts in the ordinary plagiarism case is whether the allegedly offending work is "recognizable by an ordinary observer as having been taken from the copyrighted source." *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. 2d 354 (9th Cir., 1947); *Kustoff v. Chaplin*, 120 F. 2d 551 (9th Cir., 1941); *Fleisher Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F. 2d 276, 278 (2nd Cir., 1934), cert. denied 294 U. S. 717. In the *Universal Pictures Co.* case, the court held that the use of even one sequence of a motion picture is an infringement. 162 F. 2d at 360. Similarly, infringement has been found where what was used was only a "small part" of a book, amounting to 300 or 400 words (*Warren v. White & Wyckoff Mfg. Co.*, 39 F. 2d 922 (S. D. N. Y. 1930), or only three sentences (*Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E. D. Pa. 1938)).

Many of the famous parodies and burlesques of history would have been held to infringe under the "ordinary observer" test. To be effective, they had to be "recognizable by an ordinary observer as having been taken from the copyrighted source." Shamela was an "outline of the important scenes and incidents in Pamela" in which only "a few of the facts" were changed.* Bret Harte used the en-

*Shepperson, The Novel in Motley; A History of the Burlesque Novel in English 23 (1936).

tire plot of Anthony Hope's "The Prisoner of Zenda," all its principal characters, and practically all its important incidents in his delightful burlesque, "Rupert the Resembler." Thackeray did the same with Dumas' "Otho the Archer." The entire story line and even much of the dialogue of Augustus Thomas' melodramatic play "Arizona" was used as the basis of the burlesque by Edgar Smith which was performed on Broadway by Weber and Fields less than two months after the play opened. Corey Ford's "Salt Water Taffy: Or, Twenty Thousand Leagues Away From the Sea" lampooned Joan Lowell's "Cradle of the Deep" chapter by chapter and incident by incident.

Thus, if the test announced by the courts below had been applicable at the time they were written, these and many other well-known parodies or burlesques could never have been published or performed. If the test be permitted to stand, the public can never again enjoy their like.

The essence of petitioner's position is that the courts below erred in lumping parody and burlesque together with uses of copyrighted material which do not constitute new and independent literary creations and are flagrant piracies. We urge that the legality of the use of a copyrighted work in the creation of a parody or burlesque should be measured by a different standard from commonplace copying.*

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*Not long after Judge Carter's decision in the instant case, an action styled *Columbia Pictures Corp. v. National Broadcasting Company*, Civil No. 16876-C, involving Sid Caesar's burlesque of the motion picture "From Here to Eternity", was also tried before him. In holding for the defendant, Judge Carter apparently receded from his opinion that a parody or burlesque must be tested by the same standard as any other appropriation, for conclusion of law No. 7 in that case states: "Since a burlesquer must make a sufficient use of the original to recall or conjure up the subject matter being

B. The Doctrine of "Fair Use" Should Be Applicable to Parody and Burlesque.

After publication, an author's only rights in his works are those granted to him by the Copyright Act. *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1, 15; see also *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 346. That Act "instead of sanctioning an existing right . . . created it." *Wheaton v. Peters*, 8 Pet. 591, 661. The power of Congress to confer such rights is limited to those which will carry out the Constitutional purpose, *i.e.*, "to promote the Progress of Science and useful Arts." Art. 1, Sec. 8; see Howell, "The Copyright Law," pp. 253, 260. The aim of the Constitutional provision is to stimulate intellectual creation, and reward to authors is of secondary importance. *Mazer v. Stein* 347 U. S. 201, 219, *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127. Consequently, the Act must always be construed in a manner consonant with such purposes; otherwise grave constitutional questions will arise. *Chamberlin v. Uris Sales Corp.*, 150 F. 2d 512 (2nd Cir., 1945); *Martinetti v. Maguire*, 16 Fed. Cas. 920 (C. C. Cal. 1867).

Reflecting the constitutional provision, courts have fashioned and applied the doctrine of "fair use" which permits the substantial use of copyrighted material for purposes which promote the progress of science and the

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burlesqued, the law permits more extensive use of the protectible portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original." See Note, 56 Col. L. Rev. 585, 602-603. The decision in that case was not appealed. However, since the Court of Appeals adopted Judge Carter's holding in the instant case, it is now the law of the Ninth Circuit that the ordinary plagiarism test must be applied to parody and burlesque, notwithstanding Judge Carter's evident doubts about his earlier holding to that effect.

useful arts.* Perhaps the best known application of the doctrine is the uniform acknowledgment that the literary critic may use substantial portions of copyrighted material in connection with his criticism.** A number of cases recognizing other types of "fair use" are set forth in the margin.*** Taken together with the literary criticism cases, they show the inaccuracy of the Court

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*In *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F. 2d 73, 85 (6th Cir., 1943) the court pointed out that "fair use" of copyrighted material is "based upon the principle that subsequent workers in the same field are not deprived of all use thereof, as, otherwise, the progress of science and the useful arts would be unduly obstructed."

**See *Folsom v. Marsh*, 9 Fed. Cas. 342, 344, No. 4901 (C. C. D. Mass. 1841); *Farmer v. Elstner*, 33 Fed. 494, 496 (C. C. Mich. 1888); *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359, 360 (S. D. N. Y. 1914).

***Karll v. Curtis Pub. Co.*, 39 F. Supp. 836 (E. D. Wis., 1941) (lyrics of the chorus of a copyrighted song written for the Green Bay Packers football team used in a magazine article about the Packers); *Broadway Music Corp. v. F-R Pub. Corp.*, 31 F. Supp. 817 (S. D. N. Y., 1940) (thirteen lines of the lyrics from the chorus of a copyrighted song popular when Pearl White was starring in "Perils of Pauline" used in a magazine article about Miss White's death); *Shapiro, Bernstein & Co. v. P. F. Collier & Co.*, 26 U. S. P. Q. 40 (D. C. N. Y., 1934) (ten lines of the lyrics from an eighteen-line chorus of a copyrighted musical comedy song used in a magazine story in which the characters heard these excerpts from the musical comedy over the radio); *Bloom & Hamlin v. Nixon*, 125 Fed. 977 (E. D. Pa., 1903) (complete chorus of a copyrighted work sung as part of an imitation of another singer who had popularized the song); *American Institute of Architects v. Fenichel*, 41 F. Supp. 146 (S. D. N. Y., 1941) (six copies of one contract form in a copyrighted bool of contract forms reproduced and distributed by an architect to certain owners and contractors with whom he was dealing); *G. Ricordi & Co. v. Mason*, 201 Fed. 182 (C. C. N. Y., 1911) (copyrighted opera libretto used to prepare a brief and fragmentary description of the plot and characters of the opera—a synopsis—which was published in a book of opera stories); *Simms v. Stanton*, 75 Fed. 6, 10-11, 17 (C. C. N. D. Cal., 1896) (same breakdown of the divisions of the subject of phrenology published in a copyrighted book used by another author who published a later book on the same subject).

of Appeals' suggestion that fair use is limited to "compilations, listings, digests and the like" [R. 283]. The rationale of the doctrine of fair use, which is as broad as the public interest in encouraging creativeness, has been epitomized by Professor Chafee as follows:

> "Nobody else should market the author's book, but we refuse to say nobody else should use it. The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.' Progress would be stifled if the author had a complete monopoly of everything in his book for fifty-six years or any other long period. Some use of its contents must be permitted in connection with the independent creation of other authors. The very policy which leads the law to encourage his creativeness also justifies it in facilitating the creativeness of others." Chafee, "Reflections on the Law of Copyright," 45 Col. L. Rev. 503, 511.

This principle of fair use should be applicable to parody and burlesque. To practice his art, the parodist or burlesquer *must* use a pre-existing work as a foundation from which to "take off" and create an independent work [R. 156]. The work he creates is a useful art, for it both entertains and provides a critique of the "original."*

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*The Court of Appeals is in error in indicating that we have attempted to justify use of prior works on the ground that burlesque is a branch of the art form of literary criticism [R. 284-285]. Although it is undeniable that most burlesques are by their nature critiques of the works burlesqued, the two art forms are separate and distinct. However, there is a vital point of similarity in that both *must* make substantial use of prior works to live and flourish. The literary critic's right to fair use of copyrighted material is well recognized; the author of a burlesque is entitled to the same right for the same reason.

The public interest in the preservation and encouragement of this art form requires that the author be accorded the broadest right of fair use.*

In determining whether the use by a parodist or burlesquer is a "fair use," the vital question is what has been done with what is used—whether on the one hand, the copyrighted material is used only as the necessary or appropriate ingredient for the independent creation of a bona fide parody or burlesque possessing the new and totally different literary characteristics of that art form, or on the other hand, the copyrighted material is taken *animus furandi* for the purpose of reproducing the basic literary values of the original and replacing that original before the public. The proper application of such a standard would obviate the Court of Appeals' fears that a dramatic work might be appropriated in its entirety "merely by introducing comic devices of clownish garb, or movement, or facial distortion of the actors; and presenting it as a burlesque" [R. 284]. Such a subterfuge can be recognized as an unfair use without any necessity for stifling the creation of bona fide parodies and burlesques.

Indeed, the failure of the Court of Appeals to accord parody and burlesque a right of fair use appears to stem from a misunderstanding of the nature of those arts.

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*American text writers are uniformly of the view that a bona fide parody or burlesque is a "fair use." Weil, "Copyright Law" 432 (1917); DeWolf, "Outline of Copyright Law" 97, 142 (1925); Spring, "Risks and Rights" 177, 183, 186 (1952); Lindey, "Plagiarism and Originality" 43 (1952); Ball, The Law of Copyright and Literary Property, Sec. 137 (1944); 13 Corpus Juris 1113, 1118. The District Court erroneously applied to parodies and burlesques statements of text writers regarding use of copyrighted matter in imitations or mimicry [R. 247].

This is apparent in the Court's reference to a serious dramatic work being "copied practically verbatim, and then presented with actors walking on their hands or with other grotesqueries" and other comments to the same effect [R. 284]. What the Court is describing is not a bona fide parody or burlesque, but a subterfuge in which the basic literary values of the original are pirated. The genuine burlesque uses copyrighted material to remind the audience of the mood and content of the "original," but then "it takes off into the blue. . . . It leaves out much, but it constantly comes back, so to speak, to refresh itself to [from] the original, and then takes off again" [R. 156]. The true burlesque or parody is never a substitute for the original, but rather, through transformation of the tone and key of the original, it is an independent work of art [R. 149]. It is this art form not a "wholesale copying," which is entitled to the broadest right of fair use.*

C. Under the Principles of "Fair Use," the Burlesque "Autolight" Does Not Infringe Respondents' Copyrights.

Since the courts below erroneously failed to recognize the parodist's right of fair use, the findings and conclusions that "Autolight" infringed respondents' copyrights

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*It is no bar to the right of fair use that burlesques and parodies are often produced for "commercial gain." Many of the uses cited above which courts have deemed to be fair, including literary criticism, are customarily made for commercial gain. Nor does the parodist's use of the story line of the "original" make the use unfair. See Yankwich, Parody and Burlesque in the Law of Copyright, 33 Canadian Bar. Rev. 1130, 1154 (1955). Almost invariably a criticism or a review of a book or motion picture sets forth the story line, and moreover, it has been held that a brief synopsis of an opera in a book of such synopses does not infringe the copyright in the libretto. *G. Ricordi Co. v. Mason,* 201 Fed. 182 (S. D. N. Y., 1911).

are, of course, not pertinent to the issue actually involved. The issue of whether "Autolight" was a "fair use" of "Gaslight" has yet to be tried. Proper application of the principles of fair use makes it clear, in our view, that "Autolight" does not constitute an infringement.

"Autolight" is a bona fide parody or burlesque and indeed there has been no suggestion that it is a subterfuge. The synopses set forth in Appendix A make it clear that every element of "Gaslight" used in "Autolight" was changed, inverted and transformed into a diametrically opposite set of literary values. Everything that was serious, tense and dramatic in the original became hilarious in the burlesque. The leading characters were mocked in an exaggerated and ludicrous fashion. In short, "Autolight" is a new and independent literary work.

In creating the burlesque, the authors of "Autolight" had to recall to the audience certain recognizable elements of "Gaslight," but their use was no greater than was reasonably appropriate for the accomplishment of their purpose. The burlesque neither supersedes the original nor materially reduces the demand for it. *Cf. Hill v. Whalen & Martell, Inc.*; 220 Fed. 359 (S. D. N. Y., 1914); *Karll v. Curtis Pub. Co.*, 39 F. Supp. 836, 837 (E. D. Wis., 1941). Far from being a "servile copying," "Autolight" was a creative work in an established field of art. *Cf. Simms v. Stanton*, 75 Fed. 6, 16 (C. C. N. D. Cal., 1896); *Warren v. White and Wyckoff Mfg. Co.*, 39 F. 2d 922 (S. D. N. Y., 1930). Moreover, there clearly was no intent to infringe. *Cf. Broadway Music Corp. v. F-R Pub. Corp.*, 31 F. Supp. 817, 818 (S. D. N. Y., 1940).

III.

The Question Presented Is of Far-reaching Importance.

This case presents an important issue whose determination will have a decisive influence on the future of the art of parody and burlesque. The courts below have denied the right of "fair use" to an author of a parody or burlesque and have held that a "substantial" use of a copyrighted work, which is usually essential to the creation of an effective burlesque or parody, constitutes infringement. Such a construction of the Copyright Act gives rights and creates limitations never before considered to have existed, as is evident from the unchallenged use of copyrighted material in the famous parodies and burlesques of literary history. If permitted to stand, it will have a stifling effect on parody and burlesque. Limited to use of insubstantial portions of copyrighted material and faced with litigation at every turn,* it seems clear that authors of parodies and burlesques will have no alternative but to abandon their art.

Prior to this decision, an increasingly important segment of the developing medium of television consisted of parodies and burlesques performed by such established artists as Sid Caesar, Imogene Coca, Red Skelton, Alan Young, and Jack Benny. Even more important, the ramifications of the decision below extend to all fields in which there is an established tradition of burlesquing

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*Since the District Court decision in this case, burlesques of two other motion pictures have been challenged in actions filed in the Federal District Court for the Southern District of California, Central Division. *Columbia Pictures Corp. v. National Broadcasting Co.* (burlesque by Sid Caesar entitled "From Here to Obscurity" of Columbia picture, "From Here to Eternity," see note, p. 12, *supra*); *Paramount Pictures Corp. v. National Broadcasting Co., Inc.*, No. 172-57-WM (burlesque by Imogene Coca entitled "City Girl" of Paramount picture, "Country Girl"; action now pending).

the original creation—novels, short stories, plays, poetry, non-fiction works, the graphic arts as represented by cartoons and caricatures, even music. In each of these categories the burlesquer or parodist inevitably uses substantially more of the original than he could properly use if he were creating a work of the same type as the original, and thus in each category the principle laid down will have an inhibiting effect.

In times when freedom of expression is threatened by widely divergent pressures, the ancient arts of parody and burlesque are worth preserving. The importance of those independent arts as forms of expression "is not lessened by the fact that they are designed to entertain as well as inform" or criticize. *Cf. Joseph Burstyn v. Wilson,* 343 U. S. 495, 501. "What is one man's amusement, teaches another's doctrine." *Winters v. New York,* 333 U. S. 507, 510; *Cf. Hannegan v. Esquire,* 327 U. S. 146. It will amount to a curtailment of precious rights of free expression if the principles enunciated by the courts below are allowed to stand and to handicap and restrict the future creation of parodies and burlesques.

The suggestion below [R. 256] that parody and burlesque can thrive on material in the public domain or material whose copyright holder may consent seems shallow. Limitation to public domain material would rob parodies and burlesques of the freshness and timeliness which is the key to their effectiveness and it would deprive the public of this type of critique of current originals. If E. B. White had been required to wait for the expiration of the copyright to Ernest Hemingway's "Across the River and Under the Trees," it is likely that his delightful parody titled "Across the Street and into the Grill"*

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*White, The Second Tree from the Corner 140 (1954).

would never have been written. With respect to "consented" material, there is no need to labor the point that, human nature being what it is, authors whose works most need the pin prick of parody would be the least likely to consent.

Conclusion.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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March, 1957

APPENDIX A.

Synopsis of "Gaslight."

The motion picture "Gaslight," almost two hours in length, is a suspenseful psychological drama. Its theme is that of the attempted destruction of one human being by another solely through pressure on the mind. It has three major protagonists—the husband (Gregory Anton), the wife (Paula), and the detective (Brian Cameron).

The opening scene of the picture acts as a prologue to set the sombre atmosphere of the drama. In it, Paula Alquist, as a child, is seen being taken by the kindly family solicitor through the fog-shrouded streets of London from the home in Thornton Square where her aunt has been brutally murdered by an unknown killer. In sharp contrast the scene immediately shifts to a bright and sunny Italian locale where Paula, grown into a lovely young woman, is studying singing. She has fallen in love with the charming and romantic musician, Gregory Anton, but the dimming memory of her early tragedy still so clouds her sensitive nature that she is fearful of accepting the happiness offered by his tenderness and understanding. She decides to take a trip alone in order to resolve her emotional conflict.

On the train to Lake Como her seat companion is Miss Thwaites, a garrulous English spinster, who in conversation unwittingly brings out the 10-year-old murder in Thornton Square. Paula's old fears overwhelm her, and when she is unexpectedly met at Lake Como by Gregory,

she rushes into his arms to try to find in his tender devotion the happiness she desperately needs.

Their honeymoon in the Alps is idyllic, but at its end they face the question of a permanent home. Gregory expresses a desire to live in London, and Paula, though with foreboding, agrees to return with him to the house in Thornton Square which she has inherited from her aunt. Together they inspect the gloomy old house and its contents, untouched since the murder. A single glove in a memento case and a portrait of Alice Alquist in the bejeweled costume of the Empress Theodora are given more than passing attention. Gregory maintains throughout his apparently completely sincere attitude of affection towards his wife until the discovery by Paula of a forgotten letter written to her aunt by a Sergius Bauer. At such discovery Gregory demonstrates a flash of sinister concern—the first sign that all is possibly not what is seems to be—but this is passed off by him as solicitude for his wife. However, from that moment the subtle attack on Paula's mind begins.

The next few scenes, in which the now-neighbor Miss Thwaites nosily interviews the deaf housekeeper and in which Gregory employs a sultry and impertinent housemaid (Nancy), develop the suspicion that something is amiss in the household—that perhaps Paula is ill. Nevertheless, she happily prepares for an outing with her husband to the Tower of London. Before leaving he makes her a present of a cameo brooch, stressing its sentimental value to him. On this holiday jaunt, so joyfully antic-

ipated by Paula, incidents of importance to the story occur: Paula discovers the loss of the cameo; Gregory shows a passionate interest in the crown jewels; and the audience is introduced to the handsome Brian Cameron, who coincidentally is present at the Tower. On their return to Thornton Square, Gregory adroitly turns attention to the cameo and thus "discovers" that Paula has "lost" it. At this point for the first time and after Gregory has left the house, there occurs the dramatic and chilling effect of the dimming of the gaslights, accompanied by faint noises overhead.

The play now switches to Brian, the handsome stranger, who has heretofore appeared only in the scene at the Tower of London. He and Miss Thwaites watch Paula make an attempt to leave the house, which is frustrated by an obvious inner compulsion of fear and mental turbulence. The audience still does not know of Brian's connection with the plot, but in the next scene at Scotland Yard we learn that Brian is a detective, that he is interested in Paula because of her resemblance to her murdered aunt, and that stolen and unrecovered jewels were involved in the murder.

The next scene takes place in the Anton home in which there is portrayed Gregory's quiet but merciless frustration of his wife's attempts to be helpful and his display of disdainful mock-pity towards her in the presence of the sullen, insolent Nancy. His cool composure is slightly but unmistakably upset by the attempts of Brian and Miss Thwaites to pay a call, and he makes it clear that

visitors must keep away not only from his wife, but from himself. With a dramatic change in mood, Gregory, using all his old-time charm, invites Paula to the theatre. She is exuberantly happy at being able to escape for a while from the shadows that surround her. Gregory sharply interrupts this happiness by "discovering" that a picture is missing from the wall. When she denies having touched it, he calls in the servants to prove by their solemn denials that she must have been wrong, and he intimates she is losing her mind. Without at any time departing from the characterization of Gregory as a man of outward charm and solicitude, the author has now planted firmly in the minds of his audience the fact that he is inwardly an inhumanly sadistic torturer. Any lingering doubts as to his character are dispelled by a scene in which Gregory shows a marked interest in the coarse little maid, Nancy, as he leaves the house alone. Again in Paula's room the gaslights go down and footsteps are heard above.

The next incident in the play involves a musicale at the home of Lady Dalroy. Snatching at her last opportunity to get away from the house and herself, Paula insists on attending. Gregory apparently acquiesces but makes it clear to the audience that he is merely rearranging his plans to profit from this new development. At the musicale in the midst of a large group of dignified and socially prominent people and with Brian watching, Gregory "discovers" that his watch has been taken and unspokenly accuses his wife of its theft. She breaks down

hysterically.. Rushing the mentally distraught girl home from this function, Gregory seizes the opportunity to inform her (falsely) that her mother had been mad. He compels her to believe that the few realities to which she is trying to cling, such as the discovery of the Sergius Bauer letter, have never existed except in her own mind. Again in her room after Gregory's departure, the gas-lights go down, the noises continue and her screams for help go unheeded.

Meanwhile, the detective, with the assistance of a subordinate acting as a police constable on the beat, has had Gregory under surveillance. They believe his nightly excursions have had as their destination the attic of his own house, which he has entered from another building. They have also obtained information which indicates that Gregory is planning some drastic immediate action against his wife. Cameron determines to warn her. He gains entry to the house by displaying the mate to the glove in the memento case, it having been given to him by Paula's aunt when he was a small boy. Once in Paula's presence, he gently but firmly forces her to understand that she is the victim of a terrible plot formulated by her husband and aimed against her mind. In a search of the house he forces open Gregory's desk and discovers the Bauer letter, which is one seeking an appointment with Alice Alquist just prior to her murder. He proves not only that the letter was no figment of Paula's imagination, but was in fact written by Gregory himself. Anton is Sergius Bauer. As Paula and the detective talk the

audience is shown Gregory in the attic feverishly searching for the jewels, and finally we see his discovery of them adorning the old costume of the Empress Theodora.

In the house below, Brian leaves to effect the capture of Gregory. Before he can do so, however, Gregory returns through a secret door and discovers the rifled desk. This compels him to quick action. In a scene with his wife he is able through sheer force of character imposed upon her sick mind to convince her that Brian himself was but a figment of her imagination. She is prepared to permit him to take her away when the detective returns, and the charming, diabolical murderer is captured and bound.

Gregory makes one last desperate attempt to escape. Left alone with his wife, he exercises all of his undeniable charm to induce her to free him by cutting his bonds. Instead, after an intense emotional struggle, she finally resolves her inward conflict by throwing the knife away, and, rejoicing in her final freedom from her husband's sinister control, calls for the detective to take Gregory away. The picture ends with the removal of Anton and a short scene between the detective and Paula giving some indication that happiness may possibly come to her at long last.

Synopsis of "Autolight."

The television parody or burlesque takes up 15 minutes of the half-hour Benny program. It utilizes for parody purposes only two incidents of "Gaslight"; (1) the episode with respect to the picture on the wall, and (2) the denouement of the disclosure by the detective, the capture of the husband and his final failure to induce his wife to free him. There is practically no suspense or dramatic development; the audience is simply told outright the bare bones of the story. Thus the skit opens by an announcer stating in pseudo-sepulchral tones, "The scene is the living room on the first floor of a four-story house in a gloomy and unfashionable quarter of London in the year 1871. Outwardly the atmosphere is one of peace, for even the servants are unaware that for the past weeks the master of the house has been systematically pursuing a sinister, diabolical scheme to drive his wife insane."

The single stage setting is a mock-Victorian living room. As the curtains open two maids are commenting upon the strange behavior of their mistress whose dinner is to consist of marinated salami with sour cream. Barbara Stanwyck, as "Bella," enters emoting ostentatiously. She is tormented by headaches. She is not particularly surprised at the type of food set before her, but cries desperately for her absent husband.

Enter Jack Benny, in an obvious takeoff of the suave, cold-hearted Gregory Anton. His every act, down to the exaggerated removal of his gloves finger by finger,

is a burlesque of Boyer's polished performance. To Barbara's frenzied appeal for affection he is cold. Why has she left her room? Her reason is logical—what with breakfast in bed and lunch in bed, the bed was full of dirty dishes.

Jack rings for the maid and the pull of the bell rope brings down a shower of bricks and plaster. This running "gag," used throughout the show, serves several purposes. It permits Benny to mock Boyer's nonchalance; it demonstrates the poorly built nature of the house; it lets Barbara illustrate her sanity (for later when she pulls the bell cord, she first carefully raises her umbrella), and it ultimately provides a smash conclusion.

When no one answers his summons, Jack lures Barbara into inattention, thus giving him an opportunity to rush about the room turning various pictures upside down with comic results. Having accomplished this purpose, he forthwith accuses Barbara of reversing the pictures, and declares bluntly that she is losing her mind. Her difficulty is that she either turns everything in the house upside down or does everything backward. "Yesterday when you came back from the fox hunt, you hung your riding habit in the stable and put the horse in that closet." She suggests that perhaps the butler has tampered with the picture. This presents Jack with an opportunity to ring for the butler, with the usual plaster shower result which he accepts with injured but stoic innocence.

Jeeves, the butler, proves to be Rochester, who regularly appears on the television program as Benny's colored

servant. He is dressed in a travesty of English servant-livery, knee-breeches and all, and combines exaggerated Briticisms with a Harlem accent. He is able quickly to clear himself by pointing out the absurdity of any idea that he has ever worked sufficiently to touch the furnishings. As a reward he secures a day off to go to a cricket match.

At this point Jack announces that he must leave for an appointment (unfortunately, as he admits, not a romantic one), and he does so after a kiss which Miss Stanwyck describes as "one-dimensional." This makes room for the entrance of the detective, played by Bob Crosby, Benny's orchestra leader. The detective is not only a Scotland Yard man; he doubles as a carpenter (he built the house) and is also somewhat of a magician. Barbara conveniently "mistakes" him for her husband, resulting in an amorous interlude hampered by the physical presence of Bob's carpenter-saw. This over, Bob goes directly to the point and in a few nonchalantly delivered sentences capsulizes the basic "Gaslight" plot. He tells Barbara that her husband is a jewel thief; that 10 years before he murdered a woman in this house; that he married Barbara so that he can search for the jewels; and that he is trying to drive her insane so that he can have her taken away and continue his search in the attic.*

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*If this narrative monologue which takes less than 60 seconds had been omitted, any claim that the burlesque used the "story" of "Gaslight" would have small foundation. By the same token, such omission would have made it more difficult for the audience to recall to its mind the original and would thus have seriously blunted the comic effect of the burlesque.

Jack is now heard returning. Barbara cautions Crosby to hide in a closet. The first one selected proves to be occupied—by the horse! After Bob's concealment in another closet she decides to offer him the rest of the marinated salami, but he is not there. Magically he has transformed himself to the first closet. This, he declares, is for the purpose of proving to her that she is really quite sane, and of course parodies the gentle but serious approach which Joseph Cotten makes to Miss Bergman in the picture.

Jack returns. He reiterates his accusation about his wife's proclivity for turning everything in the house upside down—the tables, the pictures, the chairs. This time she has gone too far, for the butler himself has been turned upside down and enters carrying a tray of drinks on his feet. Obviously this is only another part of Jack's cruel plot to confuse his wife. But she is now fully apprised of the facts and tells him so. Goaded to desperation the mousy Mr. Benny physically attacks the not-diminutive Miss Stanwyck, who loudly shrieks for the detective. He enters quite unperturbed by this scene of violence and is only interested in finding some rye bread to go with his salami. Urged on by Barbara, however, he finally remembers his role sufficiently to arrest Jack. He then retires to the kitchen, leaving Jack, trussed up, alone with Barbara.

The conclusion of the burlesque parodies that of the picture. Jack demands that Barbara get the knife and cut him loose. With a diabolical gleam in her eye she

announces that she intends to do just that—cut him *very* loose! In a travesty of Paula's denunciation at the close of the motion picture, Barbara declaims:

> "It was you who turned the pictures upside down; it was you who turned the lamp upside down and almost convinced me that I did it; then you turned the table upside down, the desk upside down—One day I baked an upside-down cake and you turned it rightside up!"

With the knife at the very throat of the cowering Jack, she decides that killing is too good for such a scoundrel and instead rushes to summon the detective. As she pulls the bell rope and Bob enters, practically the entire ceiling falls down on the three actors, and the curtain descends on a scene of utter chaos.